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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-977

HUBBARD BROADCASTING, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN BROADCASTING COMPANIES,
INC. IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	17
CONCLUSION	19

II

TABLE OF AUTHORITIES

Cases:	Page
<i>American Broadcasting Co. v. FCC</i> , 89 U.S. App. D.C. 298, 191 F.2d 492 (1951)	1, 4, 7
<i>American Broadcasting-Paramount Theatres, Inc. v. FCC</i> , 14 RR 2020 (U.S. App. D.C. September 27, 1956)	1, 4, 7
<i>American Broadcasting-Paramount Theatres, Inc. v. FCC</i> , 108 U.S. App. D.C. 83, 280 F.2d 631 (1960)	passim
<i>American Broadcasting-Paramount Theatres, Inc. v. FCC</i> , 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), cert. denied, 383 U.S. 906 (1966)	2, 5, 13
<i>American Power & Light Corp. v. SEC</i> , 329 U.S. 90 (1946)	18
<i>American Trucking Association v. Atchison, T. & S. F. Ry. Co.</i> , 387 U.S. 397, rehearing denied, 389 U.S. 889 (1967)	18
<i>Goodwill Stations, Inc. v. FCC</i> , 117 U.S. App. D.C. 64, 325 F.2d 637 (1963)	3, 9
<i>Hale v. FCC</i> , 138 U.S. App. D.C. 125, 425 F.2d 556 (1970)	18

Administrative Decisions:

<i>Albuquerque Broadcasting Co.</i> , 8 RR 346 (1952)	7
<i>Albuquerque Broadcasting Co.</i> , 12 RR 583 (1955) ..	7
<i>Albuquerque Broadcasting Co.</i> , 13 RR 861 (1956) ..	7
<i>Albuquerque Broadcasting Co.</i> , 25 FCC 683 (1958)	8, 9
<i>Albuquerque Broadcasting Co.</i> , 25 FCC 805 (1958)	8, 9
<i>American Broadcasting Co., Inc.</i> , 5 RR 1117 (1949)	6
<i>Clear Channel Broadcasting</i> , 31 FCC 565 (1961) ..	11
<i>Clear Channel Broadcasting</i> , 17 FCC 2d 257 (1969)	14
<i>Clear Channel Broadcasting</i> , 59 FCC 2d 32 (1976) ..	passim

III

TABLE OF AUTHORITIES—Continued

	Page
<i>Hubbard Broadcasting, Inc.</i> , 35 FCC 36 (1963)	12
<i>Hubbard Broadcasting, Inc. (KOB)</i> , 4 FCC 2d 606 (1966)	14
<i>Rule Amendments—Parts 73 and 74</i> , 12 RR 2d 1591 (1968)	14
Statutes and Regulations:	
28 U.S.C. 1254 (1)	2
47 U.S.C. 307 (b)	16, 17, 18
47 C.F.R. § 73.22	14
47 C.F.R. § 73.25 (a)	14
Miscellaneous:	
11 Fed. Reg. 12232	6

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported (Pet. App. G). Earlier opinions concerning this same controversy are *American Broadcasting Co. v. FCC*, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 14 RR 2020 (U.S. App. D.C., September 27, 1956); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S.

App. D.C. 83, 280 F.2d 631 (1960); and *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the decision of the Federal Communications Commission, establishing KOB as a Class II-A station on Class I-A clear channel 770 KHz, in exactly the same fashion as Class II-A stations have been authorized to operate on eleven other Class I-A clear channels, was arbitrary, capricious and unreasonable under all the circumstances involved in this prolonged controversy.

STATEMENT

The facts surrounding this 37-year old controversy—which was five times before the court below and which this Court refused to review in 1966—may be briefly summarized as follows. In the 1920's, the Federal Radio Commission made provision for three Class I-A stations in New York City.¹ Eventually, the flagship stations

¹ The Commission's allocation of AM frequencies originally contemplated four classes of stations: Class I with up to 50 kw power on the clear channels; Class II also on the clear channels with power up to 50 kw but with service curtailed to protect the dominant Class I stations; Class III on regional frequencies with power up to 5 kw; and Class IV on local frequencies with power of 250 watts (later, 1 kw, day). This case concerns Class I-A stations whose characteristics were, originally, operation with 50 kw, unlimited time, non-directional, *with no other station operating on the same frequency at night*. Class I-B stations also operated with 50 kw, unlimited time; however, typically *two* such stations occupied

for the emerging three major national radio networks occupied these frequencies—WNBC for NBC's Red Network (660 KHz); WJZ (now WABC) for NBC's Blue Network and later the ABC network (770 KHz); and WCBS for the CBS network (880 KHz). Each station operated with 50 kw, non-directional and no other station operated at night on any of these frequencies in the continental United States.

In 1941, as the result of a treaty, the U.S. lost priorities on certain of its clear channels. KOB, in the resulting reshuffle, was placed on 1030 KHz but subsequently (in October 1941) authorized to operate "temporarily" on 770 KHz (with 50 kw, day, 25 kw, night, non-directional) under a Special Service Authorization limited to three months. Notwithstanding this limitation, KOB, with one mode of operation or another, has operated on 770 KHz ever since.

In 1945, the Commission instituted a rulemaking to consider uses of clear channels generally (Docket 6741)—a proceeding which was to remain intertwined with the "KOB problem." With the Commission vacillating between an *ad hoc* proceeding and the Clear Channel Proceeding to resolve KOB's status, ABC first brought the matter to the court below in 1949.

In 1951, that court ordered the Commission to act "with all deliberate speed" on ABC's complaints of inter-

the same frequency at night, each directionalized to protect the other. In 1961, the Commission, as the result of its Clear Channel rulemaking (Docket 6741), established Class II-A stations—authorized to operate fulltime on the same frequency as the Class I-A station but with the Class II-A station directionalized at night to protect the dominant station which continued to operate non-directionally. See *Goodwill Stations, Inc. v. FCC*, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). No more than one Class II-A station may operate on each of the Class I-A frequencies selected for this use.

ference.² When, after five years, the Commission had provided no solution, the court directed the Commission to accord relief within sixty days.³ KOB was thereupon permitted to remain on 770 KHz but required to directionalize to protect WABC at night.

Thereafter, the Commission decided in 1960 that 770 KHz should be re-classified a I-B frequency—with both KOB and WABC directionalized to protect each other, while the status of WNBC and WCBS (both still unduplicated at night) was left for later determination in the Clear Channel Proceeding (Docket 6741). The court below affirmed that action as a temporary measure, pending final action in the Clear Channel Proceeding with the caveat that the Commission discontinue treating WABC in an inequitable fashion *vis-a-vis* the other two networks.⁴

The Commission subsequently decided the Clear Channel Proceeding and classified the New York CBS and NBC stations, not as I-B stations as had been done with 770 KHz, but as I-A's with single Class II-A directionalized operations permitted on each channel and WCBS and WNBC retained as the Class I-A stations in non-directional status.⁵ The court below reversed again, holding that, in light of its prior decisions, the Commission's continued unequal and inequitable treatment

² *American Broadcasting Co. v. FCC*, 89 U.S. App. D.C. at 307, 191 F.2d at 502.

³ *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 14 RR 2020 (U.S. App. D.C., September 27, 1956).

⁴ *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960).

⁵ Similar treatment was afforded eleven other clear channel frequencies.

of WABC as a Class I-B station could not be justified. This Court refused to review that decision.⁶

Upon remand, the Commission re-opened the Clear Channel rulemaking proceeding insofar as it related to 770 KHz (Docket 6741); received comments from the interested parties; and reached the decision of which review is now sought—a decision which classifies KOB as a Class II-A station, directionalized to protect WABC as the Class I-A station, the exact same treatment given the eleven other eastern clear channels.

A unanimous panel of the court of appeals affirmed that decision without opinion. The instant petition for certiorari, which we oppose, followed.

Against this summarized background, we offer the following more detailed statement of this prolonged controversy. The initial encroachment on WABC's rights on 770 KHz occurred in October 1941, when the Commission granted Station KOB, Albuquerque, New Mexico (1030 KHz, 10 kw, U) "special temporary authority" to operate on 770 KHz (50 kw day, 25 kw night) while certain skywave measurements were being taken by the Commission on that and other frequencies—a measurement program interrupted seven weeks later by Pearl Harbor and never thereafter resumed.

Notwithstanding assurances by the Commission, in response to objections interposed by WABC that KOB's operation on 770 KHz was a "temporary" measure, unavoidable in view of the war-time freeze on construction, KOB filed an application in 1944 for a regular license to operate nondirectionally with 50 kw on 770 KHz, accompanied by a petition to "breakdown" 770 KHz to permit two unlimited-time Class I stations thereon.

⁶ *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966).

A hearing on KOB's application was held in January 1945, with the hearing issues restricted solely to engineering matters. (Docket 6584).

Some five weeks later (on February 20, 1945), on the ground that the policy questions (engineering, social and economic) involved in applications for the breakdown of clear channels could be more appropriately considered in an overall rulemaking rather than in an *ad hoc* adjudicatory proceeding, the Commission instituted its so-called Clear Channel Proceeding (Docket 6741) and thereafter dismissed all applications then pending for such breakdowns—except the application of KOB, which was placed in the pending file (11 *Fed. Reg.* 12232).

After it became apparent that the Clear Channel Proceeding was not to be promptly resolved, ABC formally objected to the continuing operation of KOB on 770 KHz and the resulting loss of some 23 million listeners caused by KOB's *nondirectional* nighttime operation with 25 kw on 770 KHz. On appeal from the Commission's denial of those objections,⁷ the court of appeals in 1951 reversed, on the ground that the pendency of the Clear Channel Proceeding, with no prospect of an immediate decision therein, was not a valid excuse for the prolonged continuation of the interference which KOB was causing WABC. The court made it clear that a *temporary or interim* solution should be found, with all deliberate speed, even though the subsequent conclusions in the Clear Channel Proceeding might thereafter dictate a

⁷ See *American Broadcasting Co., Inc.*, 5 RR 1117, 1121 (1949). ABC was there told by the Commission that a final determination with respect to a *permanent* assignment for Station KOB can best be made after a final decision in the Clear Channel Hearing; and that the question of KOB's "permanent assignment . . . cannot be determined until after a decision in the Clear Channel Hearing." Although in accord with those assertions, ABC did object to the Commission's refusal to return KOB in the interim to its duly licensed frequency of 1030 KHz.

different result. *American Broadcasting Co. v. Federal Communications Commission*, 89 U.S. App. D.C. at 306, 191 F.2d at 501.

Some fourteen months thereafter the Commission removed from its pending files, as a vehicle for a temporary solution thus ordered by the court of appeals, the stale 1945 record. See *Albuquerque Broadcasting Co.*, 8 RR 346 (1952). Almost three years later, on May 26, 1955, the Commission ordered that record updated and expanded to include an engineering showing on 1030 KHz (on which KOB was duly licensed) and data on certain non-engineering matters. *Albuquerque Broadcasting Co.*, 12 RR 583 (1955).⁸ From Commission action allowing KOB in the interim to continue its nondirectional nighttime operation on 770 KHz, ABC took a second appeal (Case No. 12,883). The court of appeals on September 27, 1956, directed the Commission within sixty days to "take effective steps substantially to relieve [the present] illegal impingement upon the existing license of Station WABC" *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 14 RR 2020 (U.S. App. D.C. September 27, 1956). Pursuant to that mandate and subsequent Commission orders, KOB directionalized its nighttime operation in April 1957 (770 KHz, 50 kw-D, 25 kw-N, DA-N) to protect ABC's present nondirectional 0.5 mv/m 50% skywave contour.

⁸ Throughout the further hearing thus ordered in 1955 in Docket 6584, which culminated in its 1958 decision (25 FCC 683), various requests by ABC to expand the scope of that proceeding to include certain additional Class I-A frequencies and additional non-engineering matters were denied by the Commission on the premise that that proceeding was narrowly limited in purpose (to carry out the 1951 mandate of the court of appeals by finding a *temporary* berth for KOB pending a *permanent* solution of the KOB "problem" in the Clear Channel Proceeding), and should not be allowed to degenerate into a miniature clear channel hearing. *Albuquerque Broadcasting Co.*, 12 RR at 586; *Albuquerque Broadcasting Co.*, 13 RR 861, 868 (1956).

On April 15, 1958, after the record in the further hearing in Docket 6584 had already been closed, but before a decision was announced therein, the Commission reactivated its Clear Channel Proceeding (Docket 6741)—by a Second Notice which proposed to place two Class I-A directionalized operations on several eastern Class I-A channels, and which indicated for the first time that a permanent solution of the WABC-KOB controversy and the use to be made of 770 KHz would be arrived at in Docket 6584 rather than in Docket 6741.

By a Decision and Order, both adopted September 3, 1958, in Docket 6584, (*Albuquerque Broadcasting Co.*, 25 FCC 683; and *Albuquerque Broadcasting Co.*, 25 FCC 805), the Commission concluded, notwithstanding the loss to WABC of some 15 million listeners, that the frequency 770 KHz should be broken down to permit two unlimited time 50 kw *Class I* operations thereon, with each directionalized to protect the other—action in line with the Second Notice of April 1958 in Docket 6741 wherein the Commission had proposed similar action with respect to four other Eastern Class I-A channels (including those licensed to NBC and CBS in New York City). The proceedings in Docket 6584 were ordered “to remain open for the purpose of considering further adjudicatory matters” in connection with permission granted KOB and WABC to submit applications requesting specified directional patterns. (*Albuquerque Broadcasting Co.*, 25 FCC 683 at 794).*

From the concurrently issued 1958 Order amending its rules to “permit” two Class I operations on the fre-

* With the Clear Channel Proceeding reactivated, the earlier mandates of the court below carried out, and with KOB substantially protecting WABC's 0.5 mv/m 50% skywave contour, ABC urged the Commission, but to no avail, that any further proceedings in Docket 6584 be held in abeyance pending a final decision in the Clear Channel Proceeding.

quency 770 KHz (*Albuquerque Broadcasting Co.*, 25 FCC 805), ABC again appealed. In its brief in those cases, filed in February 1960, ABC complained that it had been prejudiced by being buffeted between the Clear Channel Proceeding (Docket 6741) and the KOB proceeding (Docket 6584) on the matter of the future use to be made of 770 KHz, pointing out (a) that the pendency of each proceeding had in turn been used as an excuse for not considering in either other possible frequencies for KOB and (b) that in September 1958, when the Commission ordered WABC to directionalize and to share its 770 KHz frequency with KOB in Docket 6584 (25 FCC 683), the Commission was proposing (by its Second Notice of April 1958 in Docket 6741) to take identical action in the Clear Channel Proceeding with respect to the flagship operations of NBC and CBS on 660 KHz and 880 KHz in New York, whereas in a Third Notice issued in the Clear Channel Proceeding (Docket 6741) in September 1959, a year after the KOB case had been decided and after it was again on its way to the courts, the Commission had concluded, because of skywave dislocations in the east, to repudiate the dual Class I approach which it had suggested in its Second Notice and not to require NBC, CBS, and various other eastern clears to directionalize their existing operations.¹⁰

As a result of this buffeting procedure and changes in allocation philosophy, ABC pointed out that it was about to end up with flagship facilities for its radio

¹⁰ Instead of breaking down the clears for two Class I operations each directionalizing to protect the other, the Commission in its Third Notice of 1959 proposed a *Class II* operation on each broken down clear, so directionalized as to protect the present 0.5 mv/m 50% skywave contour of the existing dominant Class I-A station—a mode of operation which ABC was fully prepared to accept on 770 KHz and which it did accept by supporting in the court below the Commission's subsequent Clear Channel decision covering all Class I-A clear channel frequencies other than 770 KHz. *Goodwill Stations, Inc. v. FCC*, *supra*.

network distinctly inferior to those of CBS and NBC, in large part because 770 KHz had been severed from the proceedings in Docket 6741, and because the proceeding in Docket 6584, after the record had been closed, had been transformed from a proceeding to carry out the court's 1951 mandate to find an *interim* solution into a proceeding to determine a permanent facility for KOB.

In its subsequently issued opinion in those cases, the court of appeals made it abundantly clear, even though it there affirmed the Commission's refusal to return KOB to 1030 KHz, that the untoward consequences feared by ABC were not there being sanctioned. *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. at 87-88, 280 F.2d at 635-636. The Commission was there explicitly told that "the position of ABC as a network should not be permanently prejudiced by forcing it to share a channel [in Docket 6584] if other networks [and Eastern clears] are [subsequently] given full use of clear channels [in Docket 6741]." The Commission was further told that it should, in the Clear Channel Proceeding, *sua sponte*, or otherwise, "seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks." The Commission sought no review of that decision or mandate.

Some 14 months thereafter, in advance of the issuance of its Clear Channel Report stating precisely how the Eastern clears were to be broken down, the Commission on July 27, 1961 directed a "further hearing" in Docket 6584 on the question whether the consideration of providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion reached in 1958 that WABC should directionalize and share its frequency with KOB.

On September 14, 1961, after a prehearing conference to delineate the scope of the further hearing ordered six weeks earlier in Docket 6584 had been held, the Commission released its Report and Order in the Clear Channel Proceeding, wherein the Commission (a) abandoned the dual Class I approach on all 25 Class I-A channels other than 770 KHz (*Clear Channel Broadcasting*, 31 FCC 565, 574); (b) left NBC's New York frequency (660 KHz) in status quo, with no provision for its duplication in the 48 contiguous states (*Id.* at 576); (c) required the *Class II-A* stations which it authorized in the west on 11 of the 25 Class I-A channels (including CBS's 880 KHz channel) to protect the existing primary and secondary service of each of the dominant Class I-A frequencies, none of which was to be required to directionalize (*Id.* at 577, 604); and despite the fact that a "further hearing" in Docket 6584 had been ordered on that very point only six weeks previously (d) reaffirmed its 1958 KOB decision providing for two Class I directional operations on 770 KHz (*Id.* at 597). From this last-mentioned pronouncement in the Clear Channel Decision, ABC filed a protective petition for review (Case No. 17,567), a petition which at ABC's request was held in abeyance pending the results of the "further hearing" in Docket 6584.

In that "further hearing", after the Commission had refused to expand the issues to include other "Eastern clears" which the court below had mentioned as a possible approach in its May 27, 1960 opinion, ABC adduced uncontradicted engineering evidence showing that the New York flagship stations for each of the three principal radio networks (ABC, CBS, and NBC) presently serve some 42,000,000 persons; that under the Clear Channel Decision (Docket 6741) NBC's and CBS's flagship stations will continue to serve some 42,000,000 persons, whereas WABC's coverage (under the 1958 decision

in Docket 6584) would be reduced to 24,000,000 persons; that the area and population which ABC would thus lose, if WABC directionalized, already receive fewer services from ABC owned or affiliated stations than they receive from CBS and NBC owned or affiliated stations, with the ABC network thus less able to bear coverage losses of that magnitude; that some 850,000 persons who presently receive a primary service from WABC (in some instances within forty miles of New York City) will hereafter be dependent on an intermittent skywave service by a single station (that of WLS in Chicago) for the program service provided by the ABC radio network; and that almost 16,000,000 persons (of whom 5,667,000 are without any primary service) will hereafter be dependent on intermittent skywave service from 0-2 (rather than 1-3) stations for the programs of the ABC radio network, whereas those same people will continue to have from 5-9 and 3-10 skywave services by which to receive the programs of the CBS and NBC radio networks (See *Hubbard Broadcasting, Inc.*, 35 FCC 36 (1963)).

On the record in that hearing and in subsequent pleadings, ABC indicated its willingness, in order to bring the KOB litigation to an end, to acquiesce in a breakdown of 770 KHz and the dual utilization of that frequency in the same fashion as that ordered on 11 of the 25 Class I-A channels in Docket 6741 (namely, the duplication of the eastern clears by a Class II-A station in the west, protecting the existing nondirectional 0.5 mv/m 50% skywave contour of the dominant station).

In a Decision adopted on July 3, 1963, (*Hubbard Broadcasting, Inc.*, 35 FCC 36, 43), the Commission adhered to its 1958 conclusion requiring WABC to directionalize and to forego some 18,000,000 listeners, even though as a result of the Clear Channel Decision both NBC and CBS continue to enjoy "full utilization" of their flagship channels in New York City (35 FCC 36).

It ignored ABC's expressed willingness to acquiesce in a breakdown of 770 KHz (and its utilization by KOB) in a fashion identical with that ordered on eleven Class I-A frequencies in the Clear Channel Decision (i.e., with KOB protecting WABC's present 0.5 mv/m 50% skywave contour).

From action granting KOB Class I-B rights on 770 KHz (770 KHz, 50 kw, U, DA-N) and refusing to renew WABC's long held license for nondirectional operation on 770 KHz in New York City (770 KHz, 50 kw, U), ABC again appealed. In a unanimous decision released February 25, 1965, the court of appeals concluded (1) that the Commission had nowhere adequately explained the disparate treatment of 770 KHz in Docket 6584 and the wholly different action it took on the remaining Class I-A clear channels in Docket 6741, and (2) that the Commission's actions on 770 KHz were violative of the court's 1960 mandate (108 U.S. App. D.C. at 89). The decision and order of the Commission were accordingly remanded for further proceedings. *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965). Following a denial of a pleading entitled "Motion for Clarification of Mandate", in truth a belated request for reconsideration of both the 1960 and 1965 decisions and mandates of the court of appeals, this Court denied *certiorari*, 383 U.S. 906 (1966). Thereafter, in an Order of April 7, 1966 the Commission directed the parties to submit memoranda setting forth their views as to the manner in which the Court's decision should be implemented. The resulting pleadings revealed unanimity of the parties that no purpose would be served by ordering further adjudicatory proceedings in Docket 6584. There was also unanimity that the proper approach was to put 770 KHz back into the Clear Channel rulemaking (Docket 6741). The Commission took action accordingly, with the precise scope

of the reopened proceeding to be set forth at a later date (*Hubbard Broadcasting, Inc. (KOB)*, 4 FCC 2d 606 (1966)). Thereafter, the frequency 770 KHz was once again included among the clears with Class I-A status (Rule 73.25(a), as amended February 28, 1968, 12 RR 2d 1591, 1593-1594).

In due course, by Notice of Proposed Rulemaking adopted April 22, 1969, and after discussing, at length, the somewhat restricted matters yet to be resolved, the Commission reopened the Clear Channel Proceeding "only" for the purpose of considering comments to amend Rules 73.25(a) and 73.22 "to specify 770 [KHz] as a I-A channel on which a class II-A station in New Mexico (KOB) may be assigned, and whatever counterproposals concerning the mode of operation of KOB, on 770 [KHz] or as a Class I station on another channel, may be presented," in the light of basic considerations there set forth. *Clear Channel Broadcasting*, 17 FCC 2d 257, 275 (1969) (footnote omitted). Comments, reply comments and other pleadings were thereupon filed by ABC and KOB.

On April 30, 1976, the Commission released its decision in the Clear Channel Proceeding, which it had thus reopened (*Clear Channel Broadcasting*, 59 FCC 2d 32). It concluded, with due regard for the prior decisions of the court of appeals, that the public interest would be served by establishing KOB as a Class II-A station on 770 KHz (with WABC operating as the dominant and non-directional station), thus treating 770 KHz in exactly the same fashion as it had earlier decided with respect to 11 other "duplicated" clear channels.

The Commission fully considered and rejected various alternatives.¹¹ It found that (a) reversion by KOB to its originally licensed frequency of 1030 KHz was un-

¹¹ *Clear Channel Broadcasting*, 59 FCC 2d at 40-42.

acceptable because of disruptive effects on channel assignments adjacent to 1030 KHz in the western United States; (b) no frequency other than 1030 KHz was reasonably available for nighttime use by KOB in New Mexico; (c) requiring each of the three New York stations to directionalize (thus making them I-B stations) "would result in very extensive losses of service in the densely populated northeastern part of the country, depriving large populations of three skywave services and of three groundwave services in areas west of New York City, where 'white areas' might result if the service of all three stations were lost;" and (d) retention of the current operating mode of KOB (directionalized as a I-B, rather than II-A station, thus intermixing I-A and I-B facilities) represented "a highly inefficient use of the channel, and if allowed to continue might well preclude the assignment of additional western Class II fulltimers on 770 KHz as part of our deliberations in the new Clear Channel proceeding (Docket 20642)." *Id.* at 41. (footnote omitted).

The Commission affirmatively found that the most efficient mode of operation for KOB would be with II-A parameters, thus returning KOB to essentially the same coverage it had between 1957 and 1963 at the time Hubbard Broadcasting, Inc. acquired the station. The Commission, in addition to referring to the mandate of the court of appeals, pointed to several intervening developments in support of its conclusion, particularly the rapid development of FM service in New Mexico since 1965, as the result of which 25.1% of the state now receives primary FM service and 70% of the state receives secondary FM service. The Commission noted that in the intervening years, FM stations had been established in seven locations within the area which KOB would serve as a I-B but not as a II-A. It also noted acceptance of an application for a second Class II-A station at Roswell,

New Mexico (KSWs) which, when implemented, would provide a first primary AM service to an area of 1,820 square miles with a population of 4,000.¹² Finally, and of particular relevance to the statutory standard requiring "among the several States and communities . . . a fair, efficient, and equitable distribution of radio service. . ." (47 U.S.C. 307(b)), the Commission noted that—with KOB operating as a Class II-A station—the State of New Mexico will be "in a better position than most western states with respect to nighttime duplication privileges on the eastern I-A clear channels." *Clear Channel Broadcasting*, 59 FCC 2d at 43. Specifically, the Commission found that only Nevada and New Mexico, as the result of its decision, will have two operating Class II-A stations on eastern clear channels.

The decision also considered, and rejected, KOB's contentions that it should ignore the "equitable channel treatment" of WABC in relation to the other two networks. The Commission noted that, in addition to the emphasis placed by the court below on equal treatment of the three networks, "both CBS and NBC have more clear channel skywave signals than does ABC in that area which would be lost to WABC by directionalizing to protect KOB at night."¹³

The Commission concluded that its decision would equalize competition among the three networks and avoid the net loss to WABC (through directionalization) of some 700,000 persons now receiving primary service and 17,200,000 in the station's secondary service area—losses which would not be sustained by NBC and CBS.¹⁴

The court of appeals affirmed the decision without opinion. (Pet. App. G).

¹² *Id.* at 42-43.

¹³ *Id.* at 44.

¹⁴ *Id.*

ARGUMENT

The petition does not present any fact or circumstance justifying review by this Court.

1. The Commission's decision—reaffirming action taken in the 1920's that 770 KHz should be utilized in the same fashion as the other eleven eastern clear channels—is not only fully justified by relevant public interest considerations, but is entirely responsive to prior mandates of the court below. KOB's suggestion that it was improper for the Commission to consider, among other matters, ABC's position in relation to CBS and NBC, is simply a request for reconsideration of the 1965 decision of the court below—which that court explicitly refused to revise in response to a "Petition for Clarification of Mandate" and which this Court declined to review.

2. It was also reasonable for the Commission—and well within its expert discretion—to conclude that the losses in groundwave and skywave service to be experienced by WABC, if required to directionalize, were not adequately balanced by the slight gains in service to New Mexico from the operation of KOB as a Class I-B station. This conclusion was rendered more compelling, as the Commission found, because of the additional radio service from the large number of FM assignments in New Mexico since 1965 and the fact that New Mexico, as the result of this decision and the Class II-A application of KSWs, Roswell, on 1020 KHz, becomes one of only two western states with two Class II-A fulltime assignments. The Commission's decision is also fully consistent with those same public interest considerations which led it, in its general Clear Channel Proceedings, to break down eleven eastern clear channels to Class II-A status (with 770 KHz, now twelve), rather than to Class I-B status. Thus, contrary to KOB's contention, the Commission's decision does not contravene the mandate of Section 307(b)

of the Communications Act to provide "among the several States and communities . . . a fair, efficient, and equitable distribution of radio service. . . ."

3. In essence, it is KOB's position that this Court should insist that 770 KHz be reclassified as a Clear I-B channel with or without similar reclassification of the NBC and CBS New York frequencies and of other eastern clear channel frequencies. The Commission gave adequate reasons—emphasizing the substantial loss of service to the populous eastern states which would result—for deciding otherwise. Such substantive revision of an agency decision is not a proper judicial function. As this and other courts have decided, regulatory agency decisions are to be affirmed unless arbitrary, capricious or unreasonable. See *American Power & Light Corp. v. SEC*, 329 U.S. 90 (1946); and *American Trucking Association v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, rehearing denied, 389 U.S. 889 (1967).

4. Finally, this Court should be aware that in its new Clear Channel Proceeding (Docket 20642) the Commission has provided a vehicle for further consideration of public interest requirements in relation to clear channel broadcasting. In that proceeding, KOB, in extensive comments, is again urging the Commission to break down the three New York City channels to I-B status. It would be particularly inappropriate for the judiciary to interpose its substantive rulemaking judgment on a matter now under active consideration and not yet ruled upon by the Commission. See *Hale v. FCC*, 138 U.S. App. D.C. 125, 425 F.2d 556 (1970).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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